IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

Supreme Court, U. S.
FILED
NOV 15 1974
MICHAEL RODAK, JR., CLERK

Nos. 73-1055, 73-1069,
73-1070, 73-1071, and 73-1072

BOWMAN TRANSPORTATION, INC., *et al.*,

Appellants,

v.

ARKANSAS-BEST FREIGHT SYSTEM, INC., *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF ARKANSAS,
FORT SMITH DIVISION

REPLY BRIEF FOR APPELLANTS BOWMAN TRANSPORTATION, INC., JOHNSON MOTOR LINES, INC., RED BALL MOTOR FREIGHT, INC., AND LORCH-WESTWAY CORPORATION, *ET AL.*

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The keystone of Appellees' argument is that the Three-Judge Court did not weigh the evidence. Brief at 9, 44. That Court's opinion refutes that contention. The Court fashioned a novel standard of judicial review,

without precedent in statute or decision. This standard accommodated improper reweighing of the evidence and rejection of the agency's specialized knowledge and expertise. The Court has reiterated these mistaken views in *Bredehoeft Produce Co. v. United States*, 376 F. Supp. 70, 79 (W.D. Ark. 1974).

Appellees acknowledge that the Court's decision is almost a verbatim copy of Appellees' proposed findings of fact and conclusions of law. Brief at 62, 63.[1] Appellees misstate Appellants' reasons for bringing this matter to the attention of this Court. Appellants' principal challenge is not to the copying itself, but to the errors copied by the Court below from Appellees' proposals. *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 656; *Bradley v. Maryland Casualty Co.*, 382 F.2d 415, 423 (8th Cir. 1967) (opinion per Blackmun, J.). Appellees thereby led the Court below into errors which must be corrected if the proper relationship between the judiciary and administrative agencies is to be preserved. *Consolo v. Federal Maritime Commission*, 383 U.S. 607, 620-621.

1. The Three-Judge District Court Re-weighed The Evidence, And Impermissibly Substituted Its Judgment For That Of The Agency.

The Court stated that "... a mere review of the sufficiency of the evidence will not suffice in a proceeding, such as the one now before the Court,

[1] The copying is 40 out of 43 pages. Compare App. 1276-1319 with App. 697-738.

where the agency action is alleged to be arbitrary and capricious and resulting from an abuse of discretion." 364 F. Supp. at 1258 (App. 726, 1307). The Court then demonstrates by the very language it used that it re-weighed the evidence stating, *inter alia*:

1. "Our review of the Division's [Commission's] report in light of the whole record compels us to the conclusion that the Division based its ultimate conclusions upon subordinate findings that can be supported only by a consideration of portions rather than the entire record.* * *" 364 F. Supp. at 1259 (App. 1309).

2. "There is no rational basis for the Division's *refusal to give weight* to the extensive transit-time studies presented by protestants [Appellees]. * * * The conclusion [by the Commission] that these studies are entitled to *little weight* because they 'relate to short periods of time' is completely arbitrary. Many covered longer periods of time than those presented by applicants and others covered periods identical to the applicants' [Appellants'].* * *" 364 F. Supp. at 1259-60 (App. 1310) (emphasis added).

3. "Other evidence presented by applicants' shippers received similar *treatment* by the Division. Findings of the Examiners, and findings embodied in an appendix to the Division's report, reflecting unfavorably upon applicants received *emphasis by the Examiners but no consideration by the Division.*" 364 F. Supp. at 1261 (App. 1311) (emphasis added).

Other examples of the District Court's weighing evidence and where its opinion proves this fact are:

(a) Transit-time evidence supporting Appellants held to be "inferior" and evidence supporting Appellees "superior". 364 F. Supp. at 1251 (App. 1294).

(b) Appellants' performance evidence held to be "inferior". 364 F. Supp. at 1251 (App. 1295).

(c) "Probative value" of similar or "identical" evidence of Appellees not properly recognized by Commission. 364 F. Supp. at 1251 (App. 1295).

(d) Appellees' transit-time studies given too "little weight" by Commission. 364 F. Supp. at 1251 (App. 1295).

(e) Commission refused "to afford weight" to Appellees' service exhibits. 364 F. Supp. at 1252 (App. 1296).

(f) Commission did not give "weight" to Appellees' "most important" evidence on transit-times. 364 F. Supp. at 1252 (App. 1310).

Characterizations of the Commission's "treatment" of the evidence as arbitrary and capricious do not prove it so. A reading of its Report proves that the Commission carried out its statutory function of weighing the evidence, comparing applicants, and determining where lies the public convenience and necessity. This was not arbitrary or capricious action but a careful, thoughtful performance of statutory duty. Appellees' claims of error really come down to the fact that the Commission does not agree with Appellees as to the weight of the evidence. The Court's decision really comes down to the fact that it does not agree with the Commission as to the weight of the evidence.

Agency findings based upon substantial evidence, as were the Commission's findings here, cannot lack a rational basis so as to be arbitrary and capricious. The Commission's Report demonstrates why the District Court did *not* find that the Commission's findings and

conclusions in this proceeding were *not* based upon substantial evidence. This Appellees' Brief concedes. Brief at 14. Under these circumstances, the Commission's findings were not and could not be irrational or arbitrary or capricious.

The Court below was led into grievous error by Appellees who supplied language in which the Court asserted that the Commission did not weigh the evidence properly. The Court's findings are thus factually incorrect. Refusal to give "weight" or giving "little weight" (App. 715) does not mean failure to weigh. The Commission's Report carefully and reasonably weighed, evaluated and explained why it could not treat Appellees' evidence as more persuasive than Appellants'. The Commission wrote a careful and exhaustive Report consisting of 59 pages plus 196 pages of Appendix (App. 101-367). Along with its own summary of the evidence regrouped geographically (App. 182-318), the Commission set forth a summary of all applications (App. 161-170), all pleadings and exceptions (App. 170-181), the Examiners' summary of Appellees' evidence (App. 316-356), a description of regular routes authorized (App. 356-358), and a listing of the increased population to be served (App. 123, 319). A reading of those pages proves conclusively that the Commission exhaustively considered all evidence presented by Appellees and Appellants, in "what is perhaps the most extensive record ever developed in connection with a single group of motor carrier applications", with 1009 witnesses presenting 23,423 pages of testimony and 1987 exhibits in 147 days of oral hearings. 114 M.C.C. at 573 (App. 103).

As stated above, the Court below held that the Commission arbitrarily gave no "weight" to Appellees' transit-time studies, which were "the most important part of [Appellees'] evidence", purportedly showing "reasonably adequate protestant service". 364 F. Supp. at 1259, 1261 (App. 1310, 1313). In fact, the "treatment" of this evidence by the Commission is fully supported by reasoning set forth in its Report, and the Commission's "treatment" is worthy of more detailed consideration as it is illustrative of the Commission's careful weighing of the evidence. After a concise summary of these transit-time studies, based upon the detailed summary prepared by the Examiners and set forth in full in Appendix G of the agency decision (App. 319-356), the Commission noted that:

> "* * * . . .[W]hile [these studies] . . . demonstrate that in certain instances during the study periods expeditious service was rendered by certain of the protestants [Appellees], these studies must be considered in the light of the facts (1) that most either relate to short periods of time or cover traffic handled for specified shippers and (2) that they were made when protestants were confronted with the possibility of grants of authority to additional carriers. When viewed in this light, we believe that protestants' studies do not present as valid a picture as those introduced by those witnesses supporting the applications here under consideration [Shippers]." 114 M.C.C. at 599 (App. 129).

The Court below erroneously stated that:

> "* * * The length of time covered by the studies or the dates embraced therein were not considered significant by the parties or the Examiners. Indeed, these facts were not deemed sufficiently important

> by the Division itself to be mentioned in its own findings relative to evidence presented by certain protestants. * * *" 364 F. Supp. at 1259 (App. 1310).

To set the record straight, both the Examiners and the Commission did find these factors important. The detailed summary of Appellees' evidence prepared by the Examiners does set forth the length of time covered or the dates of the studies, *e.g.*, 114 M.C.C. at 782, 791 (App. 344, 353) (See App. E).[2] The Commission not only presented a concise summary of this evidence. It also incorporated into its Report the full summary prepared by the Examiners. The accuracy of the Commission's summary is not challenged by the Court, which disagreed only with the conclusions drawn therefrom. Surely, no inference of arbitrary conduct by the Commission can be drawn from its action in not restating in full in the body of its Report the details of evidence set forth in an appendix to its Report.

The District Court, in re-weighing the evidence, consistently credited the conclusions of the Examiners over those of the Commission, even though it is beyond question that the ultimate responsibility in such expert

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[2] Of the approximately 200 shippers submitting transit time studies, about 185 covered traffic handled during a period of over one month. Of these approximately 45 covered traffic handled during a period of from 1 to 3 months, about 35 covered traffic handled during a period of from 3 to 6 months, about 75 covered traffic handled during a period of from 6 months to 1 year, and approximately 30 covered traffic handled during the period of 1 year or more.

While only two of the 14 protestants which submitted transit time studies introduced evidence regarding traffic handled in 1965, about 78 of the studies of the supporting shippers covered traffic handled in 1965 (some in addition to that handled in 1966 and some solely for 1965), and at least 5 covered traffic handled in 1964. (See App. E).

matters lies with the Commission. The Court confuses the Examiners' summary of the evidence, with which there is no quarrel, with their conclusions, with which the Commission disagreed. For example, the Examiners referred to the "anomaly" of certain carriers (*i.e.*, Appellant Bowman) having the dual role of applicant and protestant. (App. 753); 364 F. Supp. at 1247 (App. 1287).

This characterization demonstrates the failure of the Examiners to grasp the significance of this proceeding. The Commission sought to meet the expanding transportation needs of the Southeast and Southwest by a consolidation of multiple applications to provide service in these areas, rather than by atomized consideration of these needs on a certificate-by-certificate basis. The Court was induced by the Appellees to fall into the same error. It was for the Commission – not the Examiners or the Court – to exercise its statutory duty in making this expert judgment, which also was carried out in regrouping the deficiencies and needs of the shippers on a geographical, rather than a commodity, basis (App. 182-318). This geographical regrouping clearly established the basis for the Commission's decision that the public convenience and necessity required the additional service demanded by the outpouring of 933 shipper witnesses as well as the basis for the choice of the three Appellant carriers to meet these demonstrated needs. When the evidence is analyzed geographically, clearly these carriers must be selected as best able to supply the need which the public interest demands.

The Court's erroneous interpretation of the Commission's "treatment" of "the most important part of [Appellees'] evidence" reveals the serious distortion of the process of judicial review which occurred below.

The Court's conclusion is a prime example of its use of an improper standard of review. The Commission's consideration of such evidence as transit-time studies is a matter of fact finding properly to be reviewed pursuant to the substantial evidence test. The reviewing Court cannot substitute its judgment for that of the agency by re-weighing the evidence under the guise of the arbitrary and capricious standard. The Court was wrong both in fact and in law.[3]

The Court below simply substituted its own judgment in determining where lies the public convenience and necessity, and refused to recognize the expertise of the Commission. This was the statutory duty of the agency.

2. The Commission Did Consider All Of Appellees' Evidence.

The Court, as proposed by Appellees, stated in its opinion that the Commission did not base its conclusions upon the entire record, or did not "consider" Appellees' evidence. 364 F. Supp. at 1251, 1259 (App. 728, 1294, 1310); Appellees' Proposed Conclusion 10 (App. 777, 1309).[4] Appellees repeat this

[3] As a matter of fact, the District Court repeatedly mischaracterized transit-time studies as those of "applicants", when in fact they were presented by supporting shippers. 364 F. Supp. at 1259-60 (App. 1310-13), 364 F. Supp. at 1261 (App. 1313-14).

[4] Appellees, at page 50 of their brief, argue that "[a]lthough requested to do so by protestants, the Division refused to take official notice of the *same* edition of the *same* publication which showed that Red Ball had closed 35 of its 92 terminals." (Emphasis added). This statement is incorrect. In noting that Cole-Dixie had closed one of its terminals since the close of the hearing, the Commission relied on the Fall 1971 edition of the American Motor Carrier Directory. The evidence concerning the closing of Red

error. Brief at 55, 58-60. The Commission's Report directly refutes this erroneous conclusion, *e.g.*:

> "*The evidence considered in its entirety* is convincing that the additional service so to be authorized will serve a useful purpose, responsive to a public demand and need and that available transportation services between the points and to the extent authority is granted are not reasonably adequate to meet the demonstrated needs of the shipping and receiving public." 114 M.C.C. at 599 (App. 129) (emphasis added).

And:

> "*Considered as a whole, the record demonstrates* that many of the supporting witnesses are not receiving reasonably adequate service." *Id.* at 599-600 (App. 129-130) (emphasis added).

The Commission also twice referred to its consideration of all the evidence of the Appellees.

> "*The evidence*, the recommendations of the hearing examiners and the pleadings *have been considered*. Inasmuch as no exception is taken to the examiners' summary of the evidence presented by the protestants as to their authorities, equipment, and operations, this portion of the examiners' report is hereby adopted and is set forth in appendix G to this report." (App. 105, 319-356) (emphasis added).

> "*The evidence of the opposing carriers*, as summarized by the examiners, is set forth in appendix G of this report." (App. 128, 319-356) (emphasis added).

Ball's terminals subsequent to the hearing was published in the 1972 edition of the American Motor Carrier Directory which was released after the Commission's report which is dated December 30, 1971. In any case, this matter, along with Red Ball's explanation, was considered at the reconsideration stage.

3. The Evidence Was Mistakenly Weighed By The Court Below Under The Guise Of An Inapplicable Standard Of Review.

Appellees claim that Appellants "take the position that this Court over-spoke itself in" *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402. Brief at 23. Appellees misstate Appellants' position. Appellants' position is that *Overton Park* does not authorize the application of an additional and more rigorous Court weighing of the evidence test to adjudicatory fact findings "in a case subject to sections 556 and 557" of the Administrative Procedure Act. 5 U.S.C. §706(2)(E). The arbitrary and capricious standard cannot be used as a guise under which a reviewing Court in a case based on a formal record may arbitrarily substitute its judgment for that of the agency where, as here, the agency findings and conclusions based thereon are supported by substantial evidence.[5]

The judicial review provisions of the Administrative Procedure Act require that agency action should be set aside if it violates the Constitution or a statute. 5 U.S.C. §706(2)(B)-(C). The same is true where there is no observance of procedure required by law. *Ibid.* §706(2)(D). Trial *de novo* by the reviewing Court, in effect resorted to by the Court below, is only applicable for adjudication not subject to Sections 556

[5]For a summary of this substantial evidence, see Apps. A-D, which outline that evidence with respect to the overall public convenience and necessity (App. A) and to the basis upon which the Commission granted a certificate to each of the Appellant carriers (Apps. B, C, and D). Appellees did not allege in their complaint and have never argued that the agency order was not supported by substantial evidence. Their confused position is illustrated by their statement that the Three-Judge Court "did not find the actions and conclusions of the agency to be supported by substantial evidence, nor did the Court find that the agency made erroneous findings of fact." Brief at 9.

and 557. *Administrative Procedure Act – Legislative History*, S. Doc. 248, 79th Cong., 2d Sess. 214 (1947). *Ibid.* §706(2)(F). *Cf. First National Bank of Fayetteville v. Smith*, 365 F. Supp. 898, 910-911 (W.D. Ark. 1973) (opinion per Miller, J.) (appeal pending).

This leaves the substantial evidence rule and the standard used by the Court below. Appellees claim that "both standards are applicable". Brief at 9. The substantial evidence rule is only applicable to formal hearings on the record and is embodied in the decisional provisions of the Administrative Procedure Act. 5 U.S.C. §556(d) requires that an order issued by formal adjudication must be "supported by and in accordance with the reliable, probative and substantial evidence". This section codifies the rule developed by this Court in *Consolidated Edison Co. v. National Labor Relations Board*, 305 U.S. 197, 229, with respect to findings of fact. Under this rule, the Commission is not required specifically to consider and rule upon every item of evidence in the record or every contention made by all parties. *Minn. & St. Louis Ry. v. United States*, 361 U.S. 173, 193-194.

Congress intended the Administrative Procedure Act to be read and applied as a whole. *Administrative Procedure Act – Legislative History*, S. Doc. No. 248, 79th Cong., 2d Sess. 194, 216 (1946). Congress could not have intended to make Section 556(d) redundant by the disjunctive provisions of Section 706(2). Indeed, the arbitrary, and capricious standard of Section 706(2)(A) applies to matters "not in accordance with *law*" (emphasis added). The substantial evidence rule, enacted in Section 556(d), on the other hand, applies to findings of fact. *Camp v. Pitts*, 411 U.S. 138, 141-142.

Appellants never have contended that a concept similar to the arbitrary and capricious standard has no

application to a formal adjudicatory proceeding under the Administrative Procedure Act. *American Farm Lines v. Black Ball,* 397 U.S. 532, 538-539; *Interstate Commerce Commission v. Jersey City,* 322 U.S. 503, 514-519. Examples occur where the deciding officer fails to personally consider and appraise the record in accordance with *Morgan v. United States,* 298 U.S. 468, 477-482; where an administrative agency refuses to consolidate mutually exclusive application hearings, *Ashbacker Radio Corp. v. Federal Communications Commission,* 326 U.S. 327, 333; or where an agency refuses to allow a party to formally intervene while permitting them to file briefs and present evidence and oral argument, *Federal Communications Commission v. NBC (KOA),* 319 U.S. 239, 247. Such considerations of agency policy and procedure clearly are not at issue in the instant case.

4. This Court Should Remand With Directions To Affirm The Commission's Order.

Appellees argue, with respect to the Three-Judge Court's failure to remand, that:

> "The judgment did no more than enjoin the issuance of the specific certificates authorized in such order.
>
> * * *
>
> "The Commission remains free to consider the substantive issues of public convenience and necessity at any time and therefore its delegated powers have in no way been usurped." (Brief at 64).

Such statements are consistent with Appellees' failure to acknowledge the cost, in both dollars and time, which each delay in this proceeding has brought upon

the Shippers, to whom Appellees refer as "private Appellants". This dilatory strategy by Appellees culminated in the Three-Judge Court's permanent injunction against, rather than remand of, the Commission's order. Now, after significant but necessary delay in seeking to correct that Court's errors, "private Appellants" are faced with the prospect of a hollow victory if this Court finds for Appellants, but remands to either the Court below or to the Commission, via that Court, for further action. Appellees have nothing to lose by waiting. Appellants have nothing to gain. The real losers are the Shippers, whose needs the Commission sought to meet. Appellants therefore pray that this Court remand with directions to affirm the Commission's decision.

Such a procedure was employed by this Court in *Federal Maritime Commission v. Svenska Amerika Tinien,* 390 U.S. 238. There, as here, the proceedings had been in progress for more than eight years. The reviewing Court there, as here, had taken "the extraordinary course" of failing to remand to the agency for further action. This Court there stated:

> "Since we have found that the Commission's findings and order are supported by substantial evidence and, since there are no other meritorious contentions raised by respondents, we think it is time for a final disposition of the proceedings. The judgment of the Court of Appeals is reversed; and *the cases are remanded with directions to affirm the order of the Commission.*" 390 U.S. at 252, 253 (emphasis added).

Numerous cases have been disposed of by this Court in like manner. *Chicago & N.W. Ry. v. Atchison Topeka & Santa Fe Ry.*, 387 U.S. 326; *Illinois Central R.R. v. Norfolk and Western Ry.*, 385 U.S. 57, 75; *Consolo v. Federal Maritime Commission,* 383 U.S. 607, 621;

O'Leary v. Brown-Pacific-Maxon, Inc. 340 U.S. 504, 508; *Federal Trade Commission v. Cement Institute,* 333 U.S. 683, 730.

The record here presented is similar in all relevant aspects to these precedents. This case requires a similar resolution. Truly, here, justice delayed would be justice denied.

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APPENDIX A

Findings of Substantial Evidence in the Commission Order (114 M.C.C. 571) Determining Public Convenience and Necessity.

I. Locations of Facilities of Supporting Public Witnesses.

"Thus, the 8 remaining applicants are supported by 482 shippers with facilities located in the Southwest" specified in the following footnote as "specifically, 84 shippers have facilities in Arkansas, 6 in Colorado, 84 in Louisiana, 1 in New Mexico, 32 in Oklahoma, and 275 in Texas";

"340 shippers in the Southeast" specified in the following footnote as "Eighty-four shippers have facilities in Alabama, 15 in Florida, 114 in Georgia, 1 in Kentucky, 54 in Mississippi, 25 in North Carolina, 25 in South Carolina, 17 in Tennessee, and 5 in Virginia";

"44, collectively, in the Middle Atlantic and New England States" specified in the following footnote as "Four shippers have facilities in Connecticut, 1 in Delaware, 3 in Maryland, 8 in Massachusetts, 1 in New Hampshire, 9 in New Jersey, 5 in New York, 9 in Pennsylvania, and 4 in Rhode Island";

"and 42 in the Midwest" specified in the following footnote as "Fifteen shippers have facilities in Kansas and 27 have facilities in Missouri." 114 M.C.C. 592 (App. 122)

II. Range of Commodities Shipped by Supporting Shippers.

"[The traffic] consists of an extremely wide variety of commodities (the examiners categorized the shipper evidence according to approximately 45 different commodity descriptions) including clothing, pharmaceuticals, metal articles, leather goods, machinery, toys, grocery and department store items, commodities requiring refrigeration, and furniture." 114 M.C.C. 592 (App. 122)

III. Shipper Dissatisfaction with Existing Service.

A. "Approximately 650 shippers have complained about inconsistent and excessive transit times." 114 M.C.C. 596 (App. 126)

B. "[O]ver 200 introduced transit time studies demonstrating the undependable service they currently receive." 114 M.C.C. 596 (App. 126)

C. "About 70 of the shippers located at points in a total of 16 States complain collectively about certain carriers' service restrictions and embargoes as well as about the outright refusals of authorized carriers to handle traffic." 114 M.C.C. 596 (App. 126)

D. "Pickup and delivery complaints were voiced by about 150 shippers located throughout 18 States." 114 M.C.C. 597 (App. 127)

E. "Approximately 110 shippers complain about interline difficulties and about 200 shippers collectively complain about loss, damage, tracing difficulties, and misrouting, much of which occurred in interchange service." 114 M.C.C. 597 (App. 127)

F. "Approximately 170 shippers located at points in 20 of the involved States indicate that they have received complaints from their customers with respect to the existing service." 114 M.C.C. 597 (App. 127)

G. "The above-described difficulties have resulted in shippers losing customers, business, and short-term discounts." (Approximately 80 shippers) 114 M.C.C. 598 (App. 128)

IV. Economic Study, Department of Transportation, University of Houston *re* areas served by applicant Johnson.

"The study develops the theses that the areas presently served by Johnson and the areas Johnson proposes to serve have grown significantly in recent years; that there is substantial trade and commerce between these two areas; and that comparatively there is a paucity of single-line motor carrier service available to meet the demonstrated growth." 114 M.C.C. 592 (App. 122)

V. Population Growth in States Where Supporting Shippers Located. Appendix F 114 M.C.C. 757 (App. 319)

APPENDIX B

Findings of Substantial Evidence in the Commission Order (114 M.C.C. 571) Supporting Grant of the Bowman Application.

1. "Bowman holds. . .authority. . .from, to, and between points in a territory bounded by Chicago, Ill., and points within 35 miles of Columbus Circle, N.Y. on the north; Miami and Pensacola, Fla., and Mobile, Ala., on the south; Memphis and Tuscaloosa, Ala., on the west, and points along the eastern seaboard." 114 M.C.C. 584 (App. 114)

2. "Bowman maintains 25 terminals, most of which are located in the Southeast. It proposes to establish [21 terminals and 3 agency stations in the points proposed to be served in Arkansas, Kansas, Louisiana, Mississippi, Missouri, and Texas]. Its fleet consists of 478 tractors, including 359 sleeper cabs, and 978 trailers." 114 M.C.C. 585 (App. 115)

3. "It proposes to render 1 or 2 day service generally between Chattanooga and Memphis, Tenn., and Birmingham and Gadsden, . . . Montgomery and Mobile, Ala., on the one hand, and, on the other, points in the territory it seeks to serve. Applicant introduced exhibits showing that on the 546 shipments moving from its Miami to its Atlanta terminals (744 operating miles) during a specified 1-week period in 1966, the average transit time was 1.9 days; that on the 321 shipments moving from its Birmingham

terminal during the same period and delivered or interlined at Charlotte (408 operating miles), the average transit time was 1.5 days; that on 206 shipments moving from its Richmond, Va., terminal to its Memphis terminal (855 operating miles) during the same period, the average transit time was 2.5 days; and that on 26 shipments handled from Birmingham to New York, N.Y. (1030 operating miles) during the 1-week period, the average transit time was 2.8 days." 114 M.C.C. 585, 586 (App. 115, 116

4. "...Bowman has persuasively demonstrated a need for its services between specified points in Mississippi, Kansas, Missouri, Arkansas, Louisiana, and Texas, on the one hand, and, on the other, those points in the Southeast and East that it presently serves." 114 M.C.C. 604 (App. 150)

5. "Approximately 135 witnesses in 13 States support that portion of Bowman's application seeking authority to serve the 10 specified Mississippi points. Over 100 of these have experienced difficulties with inadequate, inconsistent, and excessive transit times. The witnesses' transit time studies show that between 3- and 4-day service is generally rendered on a substantial amount of their traffic moving between Atlanta and major Mississippi points, with transit times ranging between 1 and 7 days. From other points in the territory Bowman presently serves, transit times to Mississippi range from 3 to 21 days." 114 M.C.C. 604-605 (App. 150-151)

6. "Approximately 25 supporting witnesses have complained of either refusals by authorized carriers

to handle their traffic, and of carrier embargoes or restrictions; and about 50 have experienced pickup and delivery problems." 114 M.C.C. 605 (App. 151)

7. "Collectively, Deaton, Dixie, Campbell, Roadway, and Ryder [Protestants] are cited for refusing to handle a number of the supporting shippers' traffic to Mississippi from points in the Southeast." 114 M.C.C. 605 (App. 151)

8. "...two protestants to [the Bowman] application (Campbell and Herrin) withdrew their opposition." 114 M.C.C. 605 (App. 151)

9. "Approximately 80 witnesses support the Kansas-Missouri portion of Bowman's application. Over 60 of these complain about pickup and delivery problems, loss, damage, shortage, tracing difficulties, misrouting, interline problems, unsuitable or inadequate equipment, customer complaints, and lost business and penalties." 114 M.C.C. 606 (App. 152)

10. "[Protestants] Roadway and Transcon have declined to handle some of the supporting witnesses' traffic." 114 M.C.C. 606 (App. 152)

11. "Additionally, Bowman has shown that the present and future public convenience and necessity require the extension of its operations to points in the remaining States it proposes to serve." 114 M.C.C. 607 (App. 153)

12. "The evidence of the supporting witnesses establishes a clear and convincing public need for

single-line motor carrier service between the broad southeastern and eastern seaboard territory served by Bowman, on the one hand, and, on the other, the Arkansas points it proposes to serve. Approximately 100 witnesses supported this portion of Bowman's proposal. Many expressed a need for single-line service between the Arkansas points, on the one hand, and, on the other, points in Florida, Georgia, and the Carolinas (other than Birmingham, Atlanta, and Charlotte) for which no such service is available. Existing carriers which hold authority to operate between the Arkansas points and points which Bowman presently serves are limited territorily [sic] either with respect to the Arkansas points they serve or as to the territory Bowman already serves. As a consequence, none can provide the comprehensive single-line service that would be offered by Bowman between the involved Arkansas points and the territory it now serves, and none of the remaining applicants propose such an extensive service." 114 M.C.C. 607-608 (App. 153-154)

13. "Similarly, the protestants are unable to provide the full scope of the single-line services proposed by this applicant between the Louisiana points. . .it proposes to serve and the territory it currently serves. Over 150 witnesses support this portion of Bowman's proposal, and they too have demonstrated material inadequacies in the transportation services they now receive." 114 M.C.C. 608 (App. 154)

14. "With respect to New Orleans, the approximately 30 shippers supporting this aspect of

Bowman's application have shown that the service they are receiving between specified points in Alabama and Tennessee, on the one hand, and, on the other, New Orleans, is not adequate." 114 M.C.C. 608 (App. 154)

15. "Regarding Texas, it is noted that more witnesses from the Dallas-Fort Worth area testified in support of Bowman's application than any of the other applicants. Also, witnesses from numerous points throughout Bowman's authorized territory testified in support of this portion of its application. Many of these shippers do not presently have single-line service to this important area, and none of the other applicants proposes to render the extensive single-line services to be proffered by Bowman." 114 M.C.C. 608 (App. 154)

16. "Many shippers. . .demonstrated. . .that they require the single-line service here authorized to be provided by Bowman, and that the lack of such service has been harmful to them." 114 M.C.C. 608 (App. 154)

APPENDIX C

Findings of Substantial Evidence in the Commission Order (114 M.C.C. 571) Supporting Grant of the Johnson Application.

1. "Johnson holds regular- and irregular-route ... authority to transport principally general commodities, with the usual exceptions. Its regular routes extend between points in a territory bounded by Boston and Worcester, Mass., and Niagara Falls, Oswego, and Glen Falls, N.Y., on the north, and Pensacola, Mobile, Pascagoula and Gulfport, Miss., and New Orleans, on the south, ... Applicant's irregular-route general-commodity authority extends generally to points in New York, New Jersey, Pennsylvania, Maryland, Virginia, North and South Carolina, Georgia, and Florida." 114 M.C.C. 586 (App. 116)

2. "Johnson proposes to operate over two service routes, which it describes as the proposed northern route and the proposed southern route. The former involves general-commodity, regular-route operations between Atlanta and Dallas-Fort Worth, with service at the intermediate points of Jackson, Monroe, and Shreveport, restricted to traffic moving to, from, or through Atlanta. The southern route involves the same type of operations between New Orleans and Houston, with service at the intermediate points of Baton Rouge, Orange, and Beaumont, and service at Texas City, Tex., as an off-route point, restricted

to traffic moving to, from, or through Gulfport, Miss. In other words, no service is proposed between New Orleans and points on the southern route." 114 M.C.C. 587 (App. 117)

3. "The stated purpose of the . . . proposal is to permit service of an 'over-head' nature between points on Johnson's present system, on the one hand, and, on the other, points on the proposed routes." 114 M.C.C. 609 (App. 155) 114 M.C.C. 587 (App. 117)

4. "Applicant maintains about 35 terminals at principal points on its routes and in its irregular route territory. . . . Proposed terminal points include Baton Rouge, Beaumont, Dallas, Houston, Jackson, Monroe, and Shreveport." 114 M.C.C. 586-587 (App. 116-117)

5. "Johnson operates approximately 500 tractors and 1,000 trailers . . . and it will add 50 tractors and 100 trailers to its fleet if its application is granted." 114 M.C.C. 587 (App. 117)

6. "Presently, traffic moving to and from Texas, Louisiana, and Mississippi and points beyond is interlined by [Johnson] mostly at New Orleans and Mobile, with some being interlined at Atlanta. Under the proposal, applicant's traffic lane patterns would be revised and all traffic moving to and from the proposed service area . . . will break bulk at Charlotte, and move by two-man teams on a direct nonstop basis between Charlotte and the seven proposed terminal points. Traffic originating or terminating at points in Georgia, and in the

Montgomery and Opelika terminal areas, and in South Carolina (except Wallace, S.C.) will break bulk at Atlanta, and will move by a two-man team on a direct, nonstop dispatch between Atlanta and the seven proposed terminal points." 114 M.C.C. 587-588 (App. 117-118)

7. "Additionally, Johnson has revised its operations and effective March 13, 1966, it commenced using two-man teams which would be utilized on a direct nonstop basis between Charlotte and the seven proposed terminal points here under consideration." 114 M.C.C. 611 (App. 151)

8. "[A]pplicant generally proposes to render between 1- and 3-day LTL service between its authorized territory and the seven terminal points it seeks to serve.... At 33.3 miles per hour, the 816 miles between these terminals [Boston and Charlotte] would be traversed in 24.5 hours.... The 1,110 miles between Charlotte and Houston would be traversed in 28 hours at a speed of 39.6 miles per hour." 114 M.C.C. 589 (App. 119)

9. "Its application is supported by 236 witnesses located throughout the area it serves or proposes to serve." 114 M.C.C. 609 (App.155)

10. "Their [the supporting witnesses'] testimony establishes that the existing service on small shipments traffic between the involved territories is generally inadequate. Many of the supporting witnesses validly complain with respect to lengthy and undependable transit times; and their studies,

considered on the whole, demonstrate that inconsistent and excessive transit times have been experienced on a substantial portion of the involved traffic. Complaints also were voiced by many of the shippers with respect to poor pickup and delivery service, tracing problems, and excessive loss and damage." 114 M.C.C. 609 (App. 155)

11. "Many of the shippers' problems can be attributed to the existing joint-line motor service.... Major east coast motor common carriers ... failed to participate in this proceeding; and it is therefore apparent that important segment ... of the involved joint-line motor carrier system does not oppose the Johnson application." 114 M.C.C. 609 (App. 155)

12. "Of the single-line protestants which serve between the points Johnson proposes to serve and its present territory, Ryder does not hold authority to serve the Dallas-Fort Worth area and much of the Carolinas; Roadway holds authority to perform the proposed 'over-head' service but its service was the subject of many of the shippers' complaints; and the authorities of T.I.M.E. and Transcon are limited to such an extent that they can provide only a portion of the service proposed by Johnson." 114 M.C.C. 609 (App. 155)

APPENDIX D

Findings of Substantial Evidence in the Commission Order (114 M.C.C. 571) Supporting Grant of the Red Ball Application.

1. "*The Southwestern applicants.* Whereas the proposals of some of the southern applicants differ somewhat in scope, those of the southwestern carriers are basically similar." 114 M.C.C. 602 (App. 132)

2. "With respect to this latter category of applicants, it is our opinion that the evidence of record including the traffic volumes shown to be moving and all other relevant factors enumerated in this report, justifies a grant of authority to only one of them. In deciding which is to be granted such authority, consideration must be given to the criteria prescribed by this Commission and the courts for the selection of an applicant where, as here, it is not feasible to grant all applications seeking essentially similar authority. Those criteria, as summarized in *Kroblin Refrigerated Xpress, Inc., Ext. -Denison, Iowa*, 96 M.C.C. 233, 237 (1964), is as follows: (1) an evaluation of the existing authorities and operations of the considered applicants, (2) the location of their terminal facilities and the equipment operated by them, (3) the relative date of filing the applications, and (4) the carrier which produced the evidence supporting the finding of public need. *Cf.* also *H.C. Gabler, Inc., Ext. -Cement from Md. and*

Pa. Counties, 86 M.C.C. 447, 469-470 (1961), and cases cited therein." 114 M.C.C. 602 (App. 132

3. "Under these criteria, it is noted that Red Ball operates over a much more extensive system of routes in the Southwest than does Herrin, Strickland, or Jones;" 114 M.C.C. 602 (App. 132)

4. "The number of Red Ball terminals (92 terminals located throughout Texas, Louisiana, Arkansas, New Mexico, Colorado, and Oklahoma) is about three times the collective number of terminals operated by Herrin, Strickland, and Jones in the Southwest;" 114 M.C.C. 602 (App. 132)

5. "...with the equipment located at these terminals Red Ball is in a much better position to serve shippers and receivers located in the Southwest than Herrin, Strickland, or Jones;" 114 M.C.C. 602 (App. 132

6. "Red Ball would have to establish 3 additional terminals in the Southeast and proposes to add equipment as it becomes necessary, while (a) Herrin proposed 6 additional southeastern terminals, the reestablishment of a terminal at Little Rock, and would add 41 tractors, 80 trailers, and 67 trucks to its fleet, (b) Strickland proposes to establish 4 additional southeastern terminals, and (c) Jones proposes to establish terminals at 2 southeastern points (Atlanta and Birmingham) and at 2 southwestern points (El Dorado and Texarkana);" 114 M.C.C. 602-603 (App. 132-149)

7. "that Red Ball presented 130 supporting witnesses and an additional 23 witnesses specifically supported its application, whereas (a) Herrin presented 87 witnesses and an additional 11 supported its application, (b) Strickland presented 102 shipper witnesses, and an additional 24 supported its application, and (c) Jones presented 90 witnesses and an additional 117 supported its application;" 114 M.C.C. 603 (App. 149)

8. "Clearly, of the southwestern applicants, Red Ball has made the superior showing with respect to each of the above-described criteria, and, therefore, it is selected to receive the authority for which a public need has been found in this report." 114 M.C.C. 603 (App. 149)

9. "Moreover, none of the other three applicants proposes and none of the protestants (even considering the operations authorized since the hearing herein) is able to provide the extensive single-line service proposed by Red Ball between Atlanta and Birmingham, on the one hand, and, on the other the territory Red Ball now serves." 114 M.C.C. 603 (App. 149)

10. "Clearly, Red Ball is in a better position than Herrin to render this service." 114 M.C.C. 604 (App. 150)

APPENDIX E

REPORT AND ORDER OF ICC IN *HERRIN* APPENDIX G - PROTESTANTS EVIDENCE: TRANSIT TIME STUDIES

Consolidated	114 M.C.C. 759 (App. 321)
Watson-Wilson	*Id.* at 764-765 (App. 326-327)
Gordons	*Id.* at 768 (App. 330)
Mercury Freight	*Id.* at 771 (App. 333)
West	*Id.* at 773 (App. 335)
GFA	*Id.* at 775 (App. 337)
**Campbell Sixty-Six*	*Id.* at 777 (App. 339)
Jack Cole-Dixie	*Id.* at 778 (App. 340)
ETMF	*Id.* at 780 (App. 342)
Transcon	*Id.* at 782 (App. 344)
Roadway	*Id.* at 783 (App. 345)
United	*Id.* at 786 (App. 348)
Red Ball	*Id.* at 787 (App. 349)
Ryder	*Id.* at 788-791 (App. 350-353)

Appendix G sets forth the evidence of opposing carriers, as summarized by the Examiners. The further summary and evaluation of this evidence by the Commission appears at 114 M.C.C. 599 (App. 129).

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* Reference to data for "certain test periods" - dates and duration unspecified.